

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

RAY ANTHONY TAYLOR,  
*Petitioner.*

No. 2 CA-CR 2015-0163-PR  
Filed September 29, 2015

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.*

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Petition for Review from the Superior Court in Pima County  
No. CR20114044001  
The Honorable Richard S. Fields, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines, Deputy County Attorney, Tucson  
*Counsel for Respondent*

STATE v. TAYLOR  
Decision of the Court

Law Offices of Erin E. Duffy, P.L.L.C., Tucson  
By Erin E. Duffy  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Presiding Judge Miller concurred.

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ESPINOSA, Judge:

¶1 Petitioner Ray Taylor seeks review of the trial court's partial denial, after an evidentiary hearing, of his amended petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.<sup>1</sup> For the following reasons, we grant review but deny relief.

**Background**

¶2 After a jury trial, Taylor was convicted of possession of a deadly weapon by a prohibited possessor and unlawful discharge of a firearm within city limits, both repetitive offenses committed while Taylor was on probation. The trial court sentenced him to enhanced, concurrent prison terms, the longer of which is ten years. We affirmed his convictions and sentences on appeal. *State v. Taylor*, No. 2 CA-CR 2012-0396 (memorandum decision filed July 16, 2013).

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<sup>1</sup>The trial court granted Taylor relief on his claim, based on *Alleyne v. United States*, that a jury had been required to find Taylor committed the offenses while on probation, as that fact increased the minimum sentence available to the court. \_\_\_ U.S. \_\_\_, \_\_\_, 133 S. Ct. 2151, 2162-63 (2013); *see also* A.R.S. § 13-708(A) (defendant shall be sentenced to not less than presumptive prison term for felony conviction involving dangerous offense committed while defendant was on probation). Taylor does not seek review of that portion of the court's decision.

STATE v. TAYLOR  
Decision of the Court

In that decision, we presented the following summary of trial evidence:

[A] witness identified Taylor to Tucson police officers as the person he had seen about a half hour earlier firing a shotgun at a car that was speeding away from the area after two men who had been arguing with Taylor had jumped into the car. Officers found spent shotgun shells nearby and found an additional spent shotgun shell and a twelve-gauge shotgun in Taylor's apartment.

*Id.* ¶ 3.

¶3 Taylor then filed a notice of and petition for post-conviction relief alleging trial counsel had been ineffective in failing "to know" of and pursue a defense of justification by necessity, pursuant to A.R.S. § 13-417(A).<sup>2</sup> At an evidentiary hearing, Taylor's Rule 32 counsel asked his trial attorney, "[W]as it only after I sent you some case law that you became aware that necessity is a valid defense for [a] prohibited possessor?" After trial counsel answered affirmatively, the trial court asked Rule 32 counsel what case law she had provided, and she referred to a memorandum decision filed by this court in October 2013.<sup>3</sup> Trial counsel agreed with Taylor that, had he believed a necessity defense was available in Taylor's case,

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<sup>2</sup>"Conduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct." § 13-417(A).

<sup>3</sup>Pursuant to Rule 31.24, Ariz. R. Crim. P., and Rule 111(c), Ariz. R. Sup. Ct., such a decision is "not precedential" and its citation "for persuasive value" is prohibited. *See* Ariz. R. Sup. Ct. 111(c)(1)(C).

STATE v. TAYLOR  
Decision of the Court

he would have “very strongly looked at [tha]t,” instead of challenging Taylor’s identification as the man a witness saw firing a gun at a fleeing vehicle. Evidence was presented that the prosecutor had informed trial counsel, before trial, that the eyewitness later said Taylor had been “shot at first by the occupants of the car [and] then went into his house, got his gun, and fired back.”

¶4 At the close of the hearing, the trial court denied relief, stating the following reasons for its ruling:

[Trial counsel] did not consider necessity defense, and I think there were good reasons he didn’t consider it, because, frankly, if you believed that [the eyewitness] was correct and that he had to go back into the residence to retrieve the shotgun before he fired it, the necessity defense wouldn’t apply.

If you believed [another witness’s testimony] that he retrieved the shotgun or was handed the shotgun out of the vehicle that they both had just arrived in, Mr. Taylor had constructive possession of that shotgun. Also that, as I understand it, he resided at the same residence and had constructive possession of the shotgun that was ultimately found under the couch covers.

There are all sorts of good reasons for [trial counsel] not to have considered the necessity defense [for] that night if there is a necessity defense, and I’m not convinced that there is. There’s no clear case law in the State of Arizona that says that a prohibited possessor may raise necessity. I’m not sure that that is a defense. And if it’s unclear to me, it would

STATE v. TAYLOR  
Decision of the Court

certainly have been unclear to [trial counsel] at the time, and, therefore, it's not something that would indicate that he was ineffective.

The court's minute entry similarly reflected its finding that, "under all of the circumstances," "counsel was not ineffective . . . in failing to raise a necessity defense." This petition for review followed.

**Discussion**

¶5 On review, Taylor argues the trial court (1) "abused its discretion and committed error in finding that trial counsel was not ineffective for failing to know that necessity was a defense to the crime of possession of a deadly weapon by a prohibited possessor," and (2) "abused its discretion in failing to find that necessity is a defense" to a prohibited possession charge. He contends the court failed to apply the correct standard for ineffective assistance of counsel and improperly "framed the issue as whether there were good reasons for trial counsel not to consider the necessity defense," despite counsel's testimony that, had he regarded necessity as an available defense, he likely would have offered it.

¶6 Absent a clear abuse of discretion, we will not disturb a trial court's ruling on a petition for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). And, when the court has held an evidentiary hearing, we defer to the court's factual findings unless they are clearly erroneous. *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). In our review, we "view the facts in the light most favorable to sustaining the lower court's ruling, and we must resolve all reasonable inferences against the defendant." *Id.*; *see also State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding). We find no abuse of discretion here.

¶7 Taylor's arguments on review suggest it is he – and not the trial court – who misapprehends the showing that was required. To prevail on a claim of ineffective assistance of counsel, a defendant

STATE v. TAYLOR  
Decision of the Court

must establish that counsel's performance fell below an objectively reasonable professional standard and that he suffered prejudice from this deficient performance. See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985) (*adopting Strickland*). To demonstrate the requisite prejudice, he must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶8 At the evidentiary hearing, Taylor presented no evidence that trial counsel's failure to pursue a necessity defense in this case fell below the standard of competence required by *Strickland*. Instead, he presented only trial counsel's testimony that, with the benefit of hindsight—and in light of an unpublished decision based on different facts and filed fifteen months after Taylor's trial—he would have "given some serious thought" to offering a necessity defense. When asked about the likelihood that a necessity defense would have been successful in obtaining an acquittal for Taylor, counsel responded only that he thought "it would have had no less chance of being successful than the identity defense."

¶9 Section 13-3102(A)(4), A.R.S., prohibits a person from "knowingly . . . [p]ossessing a deadly weapon or prohibited weapon if such person is a prohibited possessor." We do not foreclose the possibility that justification by necessity might, under a rare set of facts, be an appropriate argument for a defendant charged as a prohibited possessor. But we cannot say the trial court abused its discretion in implicitly concluding Taylor failed to establish a reasonable probability that a justification instruction would have been given if requested by counsel, or a reasonable probability that a necessity defense would have been persuasive. Taylor's "possession" of a weapon appears to have been established by evidence unrelated to his claim of "necessity" in firing it, such as the police officers' discovery of a firearm in Taylor's home after the shooting occurred. Thus, the court's remarks at the evidentiary hearing appear to encompass both issues inherent in an ineffective assistance claim; that is, (1) counsel did not perform deficiently in failing to argue Taylor acted out of "necessity," pursuant to § 13-

STATE v. TAYLOR  
Decision of the Court

417(A), when, under the relevant facts, such an argument would not afford a complete defense or absolve Taylor of criminal liability, and (2) for the same reason, Taylor could not establish a reasonable probability that the result of his trial would have been different had counsel pursued a necessity defense.

**Disposition**

¶10 Based on the evidence presented, the trial court reasonably could have found Taylor failed to meet his burden of establishing ineffective assistance of trial counsel, *see* Ariz. R. Crim. P. 32.8(c), and it did not abuse its discretion in denying relief. Accordingly, although review is granted, relief is denied.